No. 87-392

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In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN T. CORRIGAN, GUARDIAN OF DAUGHTER
MAURA L. CORRIGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner is the guardian of his daughter, Maura L. Corrigan, who was gravely injured in an automobile accident caused by Patrick Patterson, a serviceman who had become extremely intoxicated at the NCO Club on an Army base. The accident occurred late in the evening of December 19, 1981, on a public road in Virginia, several miles from the base. Pet. App. 60-61. Patterson was 19 at the time (*id.* at 62), and had been served liquor after one of the bartenders at the Club had noticed his intoxicated state (*id.* at 62-63). Sale of liquor to a person who had not attained the local legal drinking age (21 in Virginia), and to an intoxicated person, was a violation of Army regulations (*id.* at 62, 73-74 n.6).

2. Petitioner brought this Federal Tort Claims Act (FTCA) action in the United States District Court for the Eastern District of Virginia against the United States as operator of the NCO Club. The district court held the United States liable under "a common law dram shop theory of liability" (Pet. App. 36-37), concluding that Virginia law recognizes such a doctrine (*id.* at 28-30).

While the case was on appeal (see Pet. App. 64-65), the Supreme Court of Virginia held that Virginia does not recognize the dram shop theory of liability, under which the seller of liquor to an intoxicated person is liable for injuries inflicted by that person as a result of his drunkeness (*Williamson* v. *Old Brogue, Inc.*, 232 Va. 350, 350 S.E.2d 621 (1986)). The court of appeals therefore reversed the district court on the dram shop liability issue (Pet. App. 66). Petitioner also had claimed that Virginia law recognizes " 'a cause of action sounding in negligence based upon the breach of an assumed duty' " and that the Army regulations prohibiting the sale of liquor to underage and inebriated persons constituted such an assumption of duty (*id.* at 67, quoting petitioner's court of appeals brief (at 25)). The court of appeals, again relying on *Williamson*, found that Virginia law was to the contrary (*ibid.*). Finally, the Fourth Circuit affirmed the district court's rejection of petitioner's argument that Virginia law would impose liability on the Army because of its special, "quasi-parental" relationship with Patterson (*id.* at 69-72).

Judge Murnaghan dissented from the panel's decision, arguing that the case should have been remanded "for development of the facts as to the extent of the Army's control over Patterson and consideration of the legal implications of that control" (Pet. App. 76).

3. Through the FTCA Congress has waived the United States' sovereign immunity in situations "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 1346(b)). Petitioner's argument in this Court can be understood in three ways, none of which presents an issue appropriate for review.

a. First, petitioner may be understood to reiterate his argument that under Virginia law the Army would be liable because it undertook a duty to protect the public from intoxicated soldiers and performed that duty negligently. As the court of appeals explained, the Army regulations that petitioner claims were violated are much like the Virginia law, discussed in *Williamson*, prohibiting the sale of liquor to intoxicated persons (Pet. App. 67-69). In *Williamson*, the Supreme Court of Virginia found that the Virginia prohibition on the sale of liquor to intoxicated persons did not create tort liability because its primary purpose was not to protect the public (350 S.E. 2d at 624-625). Similarly, there is no indication here that the Army regulations exist to protect the public rather than for reasons of military discipline. Accordingly, the Army cannot be understood to have undertaken any duty toward petitioner and the court of appeals properly found that the Supreme Court of Virginia would take the same view of the regulations that it took of the Virginia statute (Pet. App. 69). The Fourth Circuit correctly decided this question of Virginia law, which in any event would not be appropriate for review by this Court.

b. Second, petitioner may be taken as arguing (see Pet. 23) that the Army regulations are a source of substantive tort law, independent of the law of Virginia, that the district court should have applied as "the law of the place" (see 28 U.S.C. 1346(b)).

Petitioner offers no reason to believe that Congress, in authorizing the Secretary of Defense to issue regulations governing military sale of liquor (see 50 U.S.C. App. (Supp. III) 473),[1] meant to create, or authorize the Secretary to create, tort law. On the contrary, the courts of appeals agree that "negligent performance of (or failure to perform) duties embodied in federal statutes and regulations may give rise to a claim under the FTCA, but *only* if there are analogous duties under local tort law" (*Art Metal-U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1157 (D.C. Cir. 1985) (emphasis in original)). See, *e.g.*, *Sellfors* v. *United States*, 697 F.2d 1362, 1365 (11th Cir. 1983) ("The FTCA was not intended to redress breaches of federal statutory duties."), cert. denied, 468 U.S. 1204 (1984); *United Scottish Ins. Co.* v. *United States*, 614 F.2d 188, 195 (1979) (no action under FTCA for federal employee's violation of federal statute or regulation "in absence of a demonstration that the applicable state law requirements of the good samaritan doctrine are satisfied"), aff'd after remand, 692 F.2d 1209 (9th Cir. 1982), rev'd on other grounds, 467 U.S. 797 (1984); *Schindler* v. *United States*, 661 F.2d 552, 560 (6th Cir. 1981); *Clemente* v. *United States*, 567 F.2d 1140, 1149 (1st Cir. 1977) ("even where specific behavior of federal employees is required by federal statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability"), cert. denied, 435 U.S. 1006 (1978); *United States* v. *Smith*, 324 F.2d

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[1]In 1985, subsequent to the events giving rise to this case, Congress adopted legislation requiring military bases, subject to certain exceptions, to adhere to the minimum drinking age of the State in which they are located (Pub. L. No. 99-145, § 1224(a), 99 Stat. 728-729, amending 10 U.S.C. (Supp. IV) 2683). The 1985 Act also amended 50 U.S.C. App. (Supp. III) 473, making the Secretary's authority over military liquor sales expressly subject to the requirements of 10 U.S.C. (Supp. IV) 2683(c) as amended (Pub. L. No. 99-145, § 1224(b)(2), 99 Stat. 729).

622, 624-625 (5th Cir. 1963); *First State Bank* v. *United States*, 599 F.2d 558, 562 (3d Cir. 1979), cert. denied, 444 U.S. 1013 (1980).[2]

Petitioner cites *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955) and *United States* v. *Muniz*, 374 U.S. 150 (1963), as cases in which the United States was held liable in tort for violations of federal statutes or regulations under circumstances where similar liability might not have been imposed under state law. *Indian Towing*, however, held that under the FTCA the United States could not assert the governmental immunity that might have been available to a municipal corporation under Louisiana law (350 U.S. at 65); it did not suggest that there might be some source of liability other than state law. Similarly, the opinion in *Muniz* made it plain that the substantive tort rules governing lawsuits by federal prisoners would be supplied by the State in which the accident occurred (see 374 U.S. at 161-162).

c. Finally, petitioner may mean to suggest that 50 U.S.C. App. (Supp. III) 473, which authorizes the Secretary of Defense to regulate military liquor sales, gives rise to liability entirely apart from the FTCA. The statute, however, makes no mention of liability. Petitioner's argument, accordingly, runs afoul of the fundamental principle that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)).

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[2] *Ingham* v. *Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), cert. denied, 389 U.S. 931 (1967), cited by petitioner as finding the United States liable "notwithstanding the FTCA" (Pet. 21), held the government liable *under* the FTCA (see 373 F.2d at 236) and referred specifically to the requirements of New York tort law (*id.* at 232, 237 n.11, 240).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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